Supreme Court, U.S.
FILED
JAN 12 1999
OFFICE OF THE CLERK

No. 98-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12,

Petitioner,

v.

GARY A. BLOOM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January 1999

22 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Where a union wilfully misused its "membership in good standing" union security clause — by pointing to the contractual language and threatening an employee with discharge if he failed to sign the membership application and become a formal union member — may the remedy for that egregious conduct include an order expunging the misused clause from the contract?

PARTIES TO THE PROCEEDINGS

The Petition lists the National Labor Relations Board as a Respondent along with Respondent Gary A. Bloom, as required by Sup. Ct. R. 12.6. However, the Board's position before the Eighth Circuit and this Court is absolutely adverse to Mr. Bloom. (*See* Brief for the National Labor Relations Board). As such, a realignment of the parties is certainly in order.

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OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12,

Petitioner,

v.

GARY A. BLOOM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case concerns the implementation and enforcement of the policy of "voluntary unionism" enshrined in our labor laws. *See, e.g., Pattern Makers v. NLRB*, 473 U.S. 95, 104-07(1985); *CWA v. Beck*, 487 U.S. 735 (1988).

Respondent Gary A. Bloom ("Bloom") was employed by Group Health, Inc. ("GHI") within a bargaining unit represented by Petitioner, Office and Professional Employees International Union, Local 12 ("Local 12"). GHI and Local 12 entered into a collective bargaining agreement, effective December 1, 1990 through November 30, 1993, which contained the following compulsory union membership provision:

> Article 1 Union Recognition And Union Shop:
>
> . . . .
>
> 1.03 All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, **become and remain members in good standing in the Union**, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

(Petitioner's Appendix ("Pet. App.") 2a, emphasis added).

Local 12 never sent Bloom a notice that explained his true legal rights and obligations under this union security clause. (Pet. App. 57a). Indeed, Local 12 never informed a single soul in this bargaining unit that they had the right to opt for nonmembership and pay only reduced financial core fees under *CWA v. Beck*. Joint Stipulation of Facts, ¶ 10.[1]

Instead, Local 12 sent Bloom a letter seeking to enforce the literal terms of the "membership in good standing" provision. The letter stated:

> Our office has been informed that you are now working for Group Health, Inc. **We have never received an Application for Membership or a Voluntary Dues Checkoff Card from you. I am enclosing them and would like you to fill them out, sign them and return them to our office as soon as possible so that we can place you in the Union.** We need these for our records and also to send to our International Office.

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[1] Paragraph 10 of the Joint Stipulation of Facts states, in pertinent part, "Since June 23, 1991, Respondent Union, although it is a party to and has maintained and enforced the [union security provision], has failed and refused to advise newly hired employees and other employees" of their rights to remain nonmembers and pay only reduced "financial core fees" under *CWA v. Beck*.

(Appendix to the Brief in Opposition ("Opp. App.") 1a, emphasis added; *see also* Opp. App. 2a-3a).

Bloom sent a response to Local 12 in which he explained that he had not completed the membership application or dues checkoff card because he first wanted "an itemization of how union dues were spent." He also requested reimbursement of the dues that had already been withheld from his wages and paid to Local 12 without his authorization. (Opp. App. 4a).

Local 12 replied by making the following demands and threats:

> As stated in the New Member Packet, **it is a part of the Collective Bargaining Agreement between Office and Professional Employees International Union, Local 12, and Group Health, Inc. that you must become a member of the Union thirty-one days after you are hired. If you choose not to be a member of Local 12, I shall have no alternative but to request GHI that your employment be terminated.** It is my sincere hope that you will choose to join Local 12 and return the cards to this office as we have requested.

(Opp. App. 5a-6a, emphasis added; Pet. App. 3a).

In the face of this explicit threat to his employment, and the seizure of dues from his salary by GHI without any signed authorization, Bloom filed unfair labor practice charges with the National Labor Relations Board ("NLRB" or "Board") against GHI and Local 12. The NLRB General Counsel issued a formal Complaint against GHI and Local 12.

The parties entered into a Joint Stipulation of Fact, and filed a Motion To Transfer Proceedings To The Board. The Board entered an Order Granting Motion, Approving Stipulation and Transferring Proceedings To The Board. While the case was pending before the Board, GHI and Local 12 entered into a unilateral settlement with the General Counsel, over Bloom's

objections. The General Counsel, GHI and Local 12 then sought the Board's approval of that settlement. Bloom objected and asserted that the remedial portions of the Settlement Agreement were inadequate, since the union had wilfully used the language of the union security clause to try to coerce him into membership. (Opp. App. 5a-6a; Pet. App. 3a). On September 29, 1993, the Board entered an Order Granting Motion and Approving Settlement Agreement. (Pet. App. 64a).

Bloom then filed a Petition for Review with the United States Court of Appeals for the Eighth Circuit. In *Bloom v. NLRB*, 30 F.3d 1001 (1997) (Pet. App. 56a) ("*Bloom I*"), the Eighth Circuit upheld Bloom's objections, ruling that the settlement agreement was inadequate under *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), and *CWA v. Beck*, 487 U.S. 735 (1988).

The Eighth Circuit took note of the union's egregious conduct, recognizing that "Local 12 did in fact literally interpret the union security clause and threaten to seek Bloom's termination if he did not become a union member." (Pet. App. 62a). It therefore held that, "*because* the overly broad union security clause was unlawfully interpreted and applied, *an adequate remedy in this case* requires expunction of the offending clause." (Pet. App. 63a, emphasis added). The Eighth Circuit remanded the case to the Board for the entry of a remedy consistent with its opinion. *Id.*

After the remand, GHI and Local 12 negotiated a second unilateral settlement with the General Counsel. Bloom again objected, asserting that this settlement, too, was inadequate. Over his objections, the Board approved this second settlement, and dismissed the Complaint. *Group Health, Inc.*, 323 N.L.R.B. No. 31 (1997). (Pet. App. 42a). Believing that this settlement still failed to properly remedy the union's misuse of its "membership in good standing" clause, Bloom filed a second Petition for Review with the Eighth Circuit.

After the briefs on the merits were filed with the Eighth Circuit, the Court of Appeals for the Sixth Circuit issued its

decision in *Buzenius v. NLRB*, 124 F.3d 788 (1997). Shortly thereafter, the Board asked the Eighth Circuit to remand this case "for reconsideration... in light of the recent decision of the Sixth Circuit in *Buzenius v. NLRB*." On November 4, 1997, the Eighth Circuit granted the Board's Motion to Remand, but retained jurisdiction and gave the Board 90 days to reconsider *Group Health, Inc.*, 323 N.L.R.B. No. 31, in light of *Buzenius*.

On February 2, 1998, the Board issued a sharply divided decision on reconsideration. *Group Health, Inc.*, 325 N.L.R.B. No. 49. (Pet. App. 18a). The Eighth Circuit then reinstated the Petition for Review, and issued its second decision in this case, *Bloom v. NLRB*, 153 F.3d 844 (1998) (Pet. App. 1a) ("*Bloom II*").

Relying on *Beck* and *Pattern Makers*, the Eighth Circuit noted that "enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or rejected." (Pet. App. 9a-10a). The court recognized that in spite of this freedom of choice that the law demands, Local 12 had egregiously misused its clause by threatening Bloom's employment if he did not join:

> As Bloom can well attest, when an employee who is approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement in an attempt to pressure him into signing up.

(Pet. App. 12a; *see also* Opp. App. 5a-6a). Given these extreme facts, and the Board's disregard of the court of appeals' instructions in *Bloom I*, the court held that an expunction remedy was necessary to protect Bloom and his fellow employees from any further abuse at the hands of Local 12 and its requirement of "membership in good standing." *Id.*

REASONS FOR DENYING THE WRIT

Local 12 asserts that "the pivotal issue in *Bloom II* ... is 'the facial validity of a union security clause which tracks the language of § 8(a)(3).'" (Pet. 8; *see also* Question Presented, Pet. i). To the contrary, the real issue addressed by the Eighth Circuit and presented here is quite different: whether expunction of the "membership in good standing" clause is an appropriate remedy where it is undisputed that the union actively misused the "membership in good standing" language to coerce employees into joining. (*See* Pet. App. 2a-3a; Opp. App. 5a-6a).

Under the specific and egregious circumstances of this case, the Eighth Circuit felt that expunction was necessary to ensure that all employees' freedom of choice was protected and to ameliorate the effects of the union's misrepresentations. While it is true that the court of appeals did, in the course of its opinion, generally condemn "membership in good st ding" clauses as deceptive and facially invalid, that conde nation was not necessary to the court's underlying remedial decision in this case.[2]

The court of appeals specifically noted in *Bloom I* that "an adequate remedy in this case requires expunction of the offending clause," precisely because the union security clause had been "*unlawfully interpreted and applied.*" (Pet. App. 63a, emphasis

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[2] The Eighth Circuit stated broadly that it would "no longer uphold or enforce" a union security clause that uses the term "membership" or fails to apprise employees accurately of their rights. (Pet. App. 13a). However, this statement was dicta, because it was not necessary to determine the adequacy of the specific NLRB order under review. The only issue actually before the Eighth Circuit was the type of remedy that is appropriate when a union misapplies its "membership in good standing" clause and coercively misrepresents its meaning to employees. (Pet. App. 63a). For this Court to grant certiorari based on a conflict between decisions, there should "be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., *Supreme Court Practice* 167 (7th ed. 1993).

added). In *Bloom II*, the court remanded with specific instructions for expunction of Local 12's illegally applied "union security" clause, because the "settlement agreement approved by the Board on remand seems to have been calculated to evade both the letter and spirit of *Bloom I*." (Pet. App. 12a). Thus, the court of appeals could have rendered the same remedial decision without even commenting on the more general "facial validity" issue.

Stripped to its essence, this case actually concerns the proper remedy for flagrantly illegal enforcement of a "membership in good standing" clause. (Pet. App. 2a-3a; Opp. App. 5a-6a). As such, it presents an issue that the concurring opinion of Justices Kennedy and Thomas in *Marquez v. Screen Actors Guild* recognized was not before the Court in that case, to wit: what remedy is appropriate where "there is evidence that a security clause such as this one was used or intended to deceive or injure employees"? 119 S. Ct. 292, 303 (1998) (Kennedy, J., concurring); *see also id.* at 299 ("we are not deciding whether SAG illegally enforced the union security clause to require petitioner to become a member of the union or to require her to pay dues for non-collective bargaining activities") (opinion of the Court).[3]

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[3] This case also is distinguishable from *Marquez* in another respect recognized by Justices Kennedy and Thomas. The issue here is whether Local 12's conduct was an unfair labor practice, not a breach of the duty of fair representation. The sole issue in *Marquez* was whether,

> even if [a] union has an exemplary notification procedure and even if the union enforces the union security clause in perfect conformity with federal law, . . . the mere negotiation of a union security clause that tracks the language of the NLRA breaches the duty of fair representation.

119 S. Ct. at 292. As Justices Kennedy and Thomas pointed out, the Court thus did "not have before [it] the question whether use of this language, in some circumstances, might be an unfair labor practice." *Id.* at 304 (Kennedy, J., concurring). Contrary to the NLRB's argument here, this Court's answer to the fair representation question did not necessarily make "clear that a union

(continued...)

The court of appeals' decision ordering expunction as a remedy in this case was eminently fair and proper, and consistent with the Court's subsequent decision in *Marquez*. Because Local 12 has unquestionably violated the law (Pet. App. 2a-3a; Opp. App. 5a-6a), the only issue actually before this Court is the appropriate remedy which will be applied for those violations. While "membership" clauses are facially valid after *Marquez*, the remedy imposed by the Eighth Circuit against Local 12 is certainly within its sound discretion, given the union's egregious misuse of the union security clause. As this Court held in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 n.22 (1986), "the judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *See also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

Indeed, the court of appeals' expunction remedy is particularly appropriate in this case because the union admitted, in the Joint Stipulation of Facts, that it applied the clause literally and never informed a single soul in this bargaining unit that he or she had the right to opt for nonmembership and pay only reduced financial core fees under *CWA v. Beck*. *See* Joint Stipulation of Facts, ¶ 10; Opp. App. 5a-6a. Given these egregious violations of the law, *Marquez* does not undercut the court of appeals' expunction remedy.[4]

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[3](...continued)
security clause that tracks the statutory language does not violate the Act." NLRB Brief at 7-8. "As the Court's opinion [in *Marquez*] makes clear, a claim for breach of the duty of fair representation. . . , unlike an unfair-labor-practice claim, must be predicated on more than a simple violation of the [NLRA]." *Marquez*, 119 S. Ct. at 304 (Kennedy, J., concurring); *see id.* at 300, 302-03 (opinion of the Court).

[4] *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *petition for cert. granted and case remanded*, ___ U.S. ___ (1998) is not "on all fours" with the instant case, as Local 12 claims. (Pet. 6). The union in *Buzenius* did not (continued...)

In *Marquez*, this Court took great pains to issue a narrow decision, merely holding that a "membership" clause, standing alone, was facially valid. The Court did not purport to decide the scope of the remedy that would be appropriate for the type of legal violations that the stipulated record presents in this case. *Marquez*, 119 S. Ct. at 299. To the contrary, *Marquez* affirmed that, "[i]f a union negotiates a union security clause, it **must** notify workers that they may satisfy the membership requirement by paying fees to support the union's representational activities, and it **must** enforce the clause in conformity with this notification." *Id.* (emphasis added). The mandatory nature of that holding implies that strong remedies are required when—as here—unions not only fail to provide the necessary notification, but affirmatively mislead or deceive employees. *See* 119 S. Ct. at 303 (Kennedy, J., concurring).

If the Court refuses to allow any expunction order, even under circumstances such as those presented here, strong remedies will never be available to the NLRB and the courts when unions flagrantly mislead and deceive employees about their fundamental right to opt for "voluntary unionism." *Pattern Makers v. NLRB*, 473 U.S. at 104-07. Without the possibility of such strong remedies, unions will have virtual *carte blanche* to misrepresent the truth to employees, since the only penalty a union will suffer when it affirmatively lies — assuming some employee fortuitously learns the truth and has the fortitude to challenge the union in Court or before the NLRB — will be a requirement that the union quietly confess and temporarily post an obscure notice confessing its lie. *See* Pet. App. at 62a-63a. Under those circumstances, the National Labor Relations Act

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[4](...continued)
use the union security clause to coerce Mr. Buzenius into membership. Indeed, *Buzenius* was even more of a "facial" challenge to the general union security language than *Marquez*. The instant case, in contrast, contains clear evidence that the clause was "used or intended to deceive or injure employees." *Marquez*, 119 S. Ct. at 303 (Kennedy, J., concurring).

will surely become a license for unions to lie to the employees they purport to represent.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Glenn M. Taubman
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel of Record for Respondent
Gary A. Bloom

January 1999

APPENDIX A

Letter from Local 12 to Gary Bloom

October 24, 1991

[*Logo Symbol Omitted in Printing*]

Office & Professional Employees International Union, Local 12

American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress

ANITA L. BILLINGS
Business Manager
Business Representative

JO ANN J. NELSON
Business Representative

JOYCE E. TRACY
Business Representative

970 Raymond Avenue,
Suite 206
St. Paul, MN 55114
Phone: (612) 641-1471

October 24, 1991

Dear Gary:

Our office has been informed that you are now working for Group Health, Inc. We have never received an Application for Membership or a Voluntary Dues Checkoff Card from you. I am enclosing them and would like you to fill them out, sign them and return them to our office as soon as possible so that we can place you in the Union. We need these for our records and also to send to our International Office.

If you have any questions please feel free to call us.

Thank you.

Sincerely,

/s/

Bette A. Edmiston
Office Manager

Enc.

#5b:memb
opeiu#12

APPENDIX B

Local 12 Application for Membership

Office and Professional Employees International Union

APPLICATION FOR MEMBERSHIP

Desiring to become a member of a Local Union chartered by the Office and Professional Employees International Union, I hereby make application for admission to membership and authorize such organization to be my exclusive collective bargaining representative.

"Dues or contributions to the OPEIU are not deductible as charitable contributions for federal income tax purposes. Dues paid, however, may qualify as business expense, and may be deductible in limited circumstances subject to various restrictions imposed by the Internal Revenue Code."

Name_____ S.S.#_____
(Print)

Address_____ Telephone_____

City_____ State or Province_____ Zip_____

Occupation_____ Dept._____

Name of company where employed_____

_____ Date_____ 19___
Signature of Applicant

_____
Hiring Date

APPENDIX C

Local 12 Voluntary Check-off Authorization and Assignment

EMPLOYER COPY

VOLUNTARY CHECK-OFF AUTHORIZATION AND ASSIGNMENT

(Name-please print) Position Department

Soc. Sec. No. Badge or Clock No. Bldg. Hiring Date

Home Address_____ Phone No._____

City_____ State____ Zip Code_____

I hereby voluntarily authorize and request

(Employer)_____
to deduct from my wages, on account of membership in the Office and Professional Employees International Union, Local 12, uniform initiation fees and dues as prescribed by the Union. The sum or sums thus to be deducted is assigned by me to the Office and Professional Employees International Union, Local 12 and is to be remitted by the Employer to the Office and Professional Employees Union, Local 12, Minneapolis, Minnesota not later than the 10th of the month of deduction.

I submit this authorization and assignment with the understanding that it will be effective and irrevocable for a period of one year from the signing date, or up to the termination date of the current collective bargaining agreement between the Employer and the Union, whichever first occurs.

This authorization and assignment shall continue in full force and effect for yearly periods beyond the irrevocable period set forth above unless revoked by me by written notice to the Employer and the Union within fifteen (15) days following the expiration of any yearly anniversary date of this assignment.

Union dues are not deductible as charitable contributions for Federal income tax purposes.

Employee's Signature_____ Date_____

APPENDIX D

Letter from Gary A. Bloom to Local 12

October 26, 1991

October 26, 1991

Office and Professional Employees
International Union, Local 12
970 Raymond Avenue, Suite 206
St Paul, MN 55114

Dear Bette:

Thank you for your letter of October 24, I previously did receive the application for membership and the voluntary dues check-off card but had not filled either out. However, I called your office and asked for a breakdown of the union dues because I want to know where my money was going to be used. But no reply was ever sent. Then three weeks ago union dues were deducted from my check. At this time I still desire the breakdown of the union dues and please reimburse me for dues that were collected since I did not authorize these deductions.

Sincerely,

/s/

Gary Bloom
2352 County Road 24
Medina, MN 55356

APPENDIX E

Letter from Local 12 to Gary A. Bloom

October 31, 1991

[*Logo Symbol Omitted in Printing*]

Office & Professional Employees International Union, Local 12

American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress

ANITA L. BILLINGS
Business Manager
Business Representative

JO ANN J. NELSON
Business Representative

JOYCE E. TRACY
Business Representative

970 Raymond Avenue,
Suite 206
St. Paul, MN 55114
Phone (612) 641-1471

October 31, 1991

Mr. Gary A. Bloom
2352 County Road 24
Medina, MN 55356

Dear Mr. Bloom:

Your interest in Local 12 is commendable. I'm sorry I wasn't informed of your request for more information sooner.

The Stewards at the Group Health Building try to give every new Local 12 hire a New Member Packet. Evidently you did not get one as some of your questions would have been answered by reading that material. I am enclosing a packet for you. You might also be interested in the following percentage breakdown of dues:

Per capita taxes (OPEIU International, MN AFL-CIO, Central bodies, etc.)	36%
Staff Costs (wages, benefits, etc.)	42%
Payroll taxes	3%
Office expenses and insurances	5%
Conferences and conventions	3%
Negotiation expenses	10%
Legal and arbitration expenses	2%

I am also enclosing a copy of Local 12's latest Newsletter and am personally inviting you to our next General Membership Meeting on November 20, 1991.

As stated in the New Member Packet, it is a part of the Collective Bargaining Agreement between Office and Professional Employees International Union, Local 12, and Group Health, Inc. that you must become a member of the Union thirty-one days after you are hired. If you choose not to be a member of Local 12, I shall have no alternative but to request GHI that your employment be terminated. It is my sincere hope that you will choose to join Local 12 and return the cards to this office as we have requested.

Sincerely yours,

/s/

Joyce E. Tracy
Business Representative

JET:LW

cc: Karen Eliseuson, Labor Relations and Employment Manager
Enclosures